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VIA HAND DELIVERY

AUG 26 2011

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW,
Room TW-A325
Washington, DC 20554

Federal Communications Commission
Office of the Secretary

Re: Petition of Vaya Telecom, Inc. for Declaratory Ruling Regarding LEC-to-LEC VoIP Traffic Exchanges

Dear Ms. Dortch:

Pursuant to 47 C.F.R. § 1.2, Vaya Telecom, Inc. respectfully submits an original and four (4) copies of the enclosed Petition of Vaya Telecom, Inc. for Declaratory Ruling Regarding LEC-to-LEC VoIP Traffic Exchanges.

Please date-stamp the extra copy of this filing and return it with the courier. If you have any questions regarding this filing, please do not hesitate to contact me.

Respectfully submitted,

/s/

Michael B. Hazzard
Counsel for Vaya Telecom, Inc.

cc: Service List

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

Petition of Vaya Telecom, Inc. for
Declaratory Ruling Regarding LEC-to-LEC
VoIP Traffic Exchanges

WCB Docket No. _____

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AUG 26 2011

Federal Communications Commission
Office of the Secretary

**PETITION OF VAYA TELECOM, INC.
FOR DECLARATORY RULING REGARDING
LEC-TO-LEC VOIP TRAFFIC EXCHANGES**

Pursuant to 47 C.F.R. § 1.2, Vaya respectfully submits this petition for declaratory ruling in order to terminate the controversy surrounding certain LECs' unlawful attempt to collect intrastate access charges for telecommunications that are originated on the public Internet in IP format and sent to the LECs' customers for termination. Consistent with the Commission's treatment of ISP-bound traffic, this LEC-to-LEC, jurisdictionally interstate traffic exchange is subject to section 251(b)(5) of the Telecommunications Act, and not the separate intrastate access charge regimes of the states.

I. INTRODUCTION AND SUMMARY

Through this petition, Vaya seeks a declaration that, based on the Commission's existing rules, a LEC's attempt to collect intrastate access charges on LEC-to-LEC VoIP traffic exchanges is an unlawful practice. Vaya is a facilities-based provider of Session Initiation Protocol ("SIP") termination services in California. Relevant to the traffic at issue here, Vaya

receives IP-based traffic from a wide variety of companies in IP-format (including nomadic and fixed VoIP service providers) over the Internet, and then provides IP-to-PSTN protocol conversions services before sending the traffic to the Public Switched Telephone Network ("PSTN") for delivery to its intended recipient. As part of this service, Vaya also provides low-cost transport for the traffic so as to provide the lowest possible costs to its clients. When Vaya cannot provide the transport itself, it uses a variety of other carriers to provide the necessary services through its Least Cost Routing services. Vaya only sends traffic to the PSTN that originates on IP-enabled devices. Because Vaya operates its own facilities and makes extensive use of least-cost-routing technologies, it is able to offer competitive rates and high-quality services.

When Vaya cannot route a call to its intended recipient directly over its own networks, Vaya generally routes the call to its intended recipient using the lowest cost route available to it. In order to provide the best possible service to its customers at the best possible prices, Vaya takes advantage of least cost routing ("LCR") technologies. Carriers taking advantage of LCR typically sign numerous interconnection agreements with each other that specify the terms under which they do business. These agreements define the terms of payment, methods, and settlement procedures, as well as establish the method by which the carriers will notify each other of pricing changes. Carriers then use LCR technologies to select the lowest-cost path to the called party based upon the other carriers' rates, which can be updated on a monthly, weekly, or even daily basis. In this way, carriers can ensure the lowest possible costs for the traffic they route and provide the lowest possible quotes for their customers. These widely used techniques and technologies provide great savings to consumers and encourage efficient use of the network. However, to work properly, they require a predictable, smoothly functioning intercarrier

ICC
compensation system.

Certain LECs, however, are attempting to turn this system on its head by demanding that Vaya pay them inflated intrastate access charges on these VoIP traffic exchanges. This is an unlawful practice for two interdependent reasons. First, it is well-settled that traffic that is exchanged by LECs that implicates the Internet is jurisdictionally interstate traffic based on the Commission's end-to-end analysis. A LEC's intrastate switched access tariff is therefore inapplicable to this traffic on this ground alone. Second, the exchange of telecommunications between LECs is subject to section 251(b)(5) and therefore reciprocal compensation arrangements are the exclusive means by which a LEC receives compensation, not the legacy access charge regime separately preserved by section 251(g) for LEC-to-IXC traffic exchanges. By demanding that Vaya pay pursuant to their intrastate access tariff, LECs have ignored their duty to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."¹

Vaya therefore seeks a declaration confirming that it is not required to pay a LEC's intrastate tariffed access charges when Vaya receives a call that begins on the Internet and delivers that call to another LEC for termination.

II. THE TELECOMMUNICATIONS TRAFFIC EXCHANGED BETWEEN VAYA AND OTHER LECs IS JURISDICTIONALLY INTERSTATE

Consistent with the Commission's treatment of ISP-bound traffic,² the Commission should declare that the particular traffic exchanged between Vaya and other LECs is jurisdictionally interstate and inseverable on an end-to-end basis. It is well-settled – as a matter

¹ 47 U.S.C. § 251(b)(5).

² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Inter-carrier Compensation Regime, Inter-carrier Compensation for ISP-Bound Traffic* (CC Docket Nos. 96-98, 99-68 (among others)), FCC 08-262, 24 FCC Rcd. 6475 (Nov. 5, 2008) ("Core Mandamus Order").

of Commission precedent and court decisions – that ISP-bound traffic is jurisdictionally interstate traffic. The traffic exchanged between Vaya and other LECs essentially has the same characteristics but travels in the opposite direction of ISP-bound traffic: the communication is originated by an end user that subscribes to a fixed or nomadic VoIP service which utilizes the global computer network to send traffic from anywhere in the country (or world) to Vaya’s switch. In order to complete the call, Vaya must populate the signaling information with a calling party’s number before routing the call to the appropriate carrier for termination to that carrier’s customer (*i.e.*, the called party). Accordingly, on an end-to-end basis, the communications exchanged between Vaya and other LECs can begin anywhere in the country or world before they are delivered to the ultimate called party.

The Commission has consistently held that such communications utilizing the Internet, even if exchanged between LECs located in the same exchange, are jurisdictionally interstate. In 1999, the Commission issued the *ISP Declaratory Ruling*, finding that based on its “traditional” end-to-end analysis to determine whether a particular call falls within the FCC’s jurisdiction over interstate communications or the states’ jurisdiction over intrastate traffic, the Commission concluded that ISP-bound traffic should be analyzed “for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site.”³ LECs filed petitions for review of the *ISP Declaratory Ruling*, but on review the D.C. Circuit did not take issue with the Commission’s end-to-end analysis of ISP-bound traffic for purposes of determining jurisdiction. On the contrary, the court found there is “no dispute that the Commission has historically been justified in relying on this method when determining whether a particular communication is

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier for ISP-Bound Traffic*, 14 FCC Rcd. 3689, ¶ 13 (1999) (“*ISP Declaratory Ruling*”).

jurisdictionally interstate.”⁴

In 2001, the Commission issued the *ISP Remand Order* in response to the D.C. Circuit’s vacatur⁵ of the *ISP Declaratory Ruling*, reaffirming that, on an “end-to-end basis,” ISP-bound traffic is “indisputably interstate in nature” for jurisdictional purposes, because “[t]he ‘communication’ taking place is between the dial-up customer and the global computer network of web content,” not “with ISP modems.”⁶ On review, the D.C. Circuit rejected the Commission’s reliance on section 251(g) to treat ISP-bound traffic differently than other forms of traffic exchanged between LECs, but it was clear that the court did *not* decide any other issue, including the Commission’s determination that ISP-bound traffic is jurisdictionally interstate.⁷

Finally, in 2008, the Commission issued the *Core Mandamus Order*, in which it again reaffirmed “that ISP-bound traffic is jurisdictionally interstate because it is jurisdictionally mixed and inseverable.”⁸ In making this finding, the Commission noted that this traffic “melds a traditional circuit-switched local telephone network call over the [public switched telephone network] to packet switched IP-based Internet communication to Web sites.”⁹

This uniform understanding that Internet calls to ISPs are jurisdictionally interstate is consistent with, and supported by, the Commission’s numerous decisions regarding other forms of Internet access. In 1998, the Commission found that digital subscriber line (“DSL”) service is

⁴ *Bell Atlantic Tel. Cos. V. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000).

⁵ *Id.* at 8-9 (vacating on the ground that the Commission “had not provided a satisfactory explanation” for its conclusion that its jurisdictional analysis was dispositive of whether ISP-bound traffic was local traffic subject to section 251(b)(5)).

⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶ 59 (2001) (“*ISP Declaratory Ruling*”).

⁷ *WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002)

⁸ *Core Mandamus Order* at ¶ 21 n.69.

⁹ *Id.*

jurisdictionally interstate.¹⁰ More recently, the Commission has built upon this ruling – finding that it has jurisdiction over a variety of broadband Internet access services because they are jurisdictionally mixed and inseverable.¹¹ As the Commission stated in the *Cable Modem Declaratory Ruling*, “we conclude that cable modem services, as it is currently offered, is properly classified as an *interstate* information service, not a cable service, and there is no separate offering of telecommunications service.”¹²

In light of this substantial precedent, there can be no dispute that when Vaya receives an Internet call from its VoIP-service-provider customers and switches and transports a particular call to the appropriate LEC, that communication is jurisdictionally interstate on an end-to-end basis, regardless of whether the person making the call utilized a dial-up connection, a cable modem service, or a wireline broadband connection. And this is also true regardless of the dialing pattern of the communication.¹³ Because the Communications Act exclusively vests the task of regulating the rates, terms, and conditions of interstate communications to the Commission,¹⁴ any LEC that seeks to impose *intrastate* access charges on Internet

¹⁰ *GTE Tel. Operating Cos.; GTOC Tariff No. 1; GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd. 22446, ¶ 28 (1998) (finding that “GTE’s [DSL] service is subject to federal jurisdiction and is “an interstate service”).

¹¹ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) (“*Cable Modem Declaratory Ruling*”), *aff’d* *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

¹² *Id.* at ¶ 7 (emphasis added); *see also* *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (2005).

¹³ Jurisdictional analysis focuses on the overall communication – not the dialing pattern – and the Commission has repeatedly found that Internet communications are interstate. *See ISP Remand Order* at ¶ 58; *ISP Declaratory Ruling* at ¶ 13.

¹⁴ 47 U.S.C. § 152(a); *see also* *Crockett Tel. Co. v. FCC*, 966 F.2d 1564, 1566 (D.C. Cir. 1992) (“The FCC has exclusive jurisdiction to regulate interstate common carrier services including the setting of rates.”).

communications would be in violation of the Act.¹⁵

Accordingly, on this jurisdictional ground alone, Vaya seeks a declaration that intrastate switched access charges cannot be applied to LEC-to-LEC traffic exchanges that originate on the Internet.

III. LEC-TO-LEC VOIP TRAFFIC IS SECTION 251(B)(5) “TELECOMMUNICATIONS,” AND THUS SUBJECT TO THE RECIPROCAL- COMPENSATION RULES, NOT THE ACCESS CHARGE RULES

Because there was no pre-1996 Act obligation with respect to LEC-to-LEC VoIP traffic exchanges, the only reasonable construction of the 1996 Act is that the reciprocal-compensation rules for LECs’ exchanges of VoIP traffic must come from section 251(b)(5), not the access-charge regime preserved in section 251(g). Section 251(b)(5) imposes on all LECs the “duty to establish reciprocal compensation arrangements for the transport and termination of *telecommunications*.”¹⁶ And the Commission has already determined that interconnected VoIP traffic is “telecommunications” traffic:

[W]e determine that interconnected VoIP providers provide “telecommunications.” As the Commission has recognized, “the heart of ‘telecommunications’ is transmission.” The Commission has previously concluded that interconnected VoIP services involve “transmission of [voice] by aid of wire, cable, or other like connection” and/or “transmission by radio” of voice. Indeed, by definition, interconnected VoIP services are those “permitting users to receive calls from and terminate calls to the PSTN.” To provide this capability, interconnected VoIP providers may rely on their own facilities or provide access to the PSTN through others. “Over the top” interconnected VoIP providers generally purchase access to the PSTN from a telecommunications carrier who accepts outgoing traffic from and delivers incoming traffic to the interconnected VoIP provider’s media gateway. The telecommunications carrier supplies transmission to or from the

¹⁵ See 47 U.S.C. § 201(b). Similarly, any state public service commission action that sought to enforce a carrier’s intrastate switched access tariff as applied to LEC-to-LEC Internet communications exchanges would be *ultra vires*.

¹⁶ 47 U.S.C. § 251(b)(5).

PSTN user, or transmits the communication to another carrier that can transmit the communication to the PSTN user.... *The telecommunications carriers involved in originating or terminating a communication via the PSTN are by definition offering “telecommunications.”*¹⁷

Similarly, the Commission has recently noted that “interconnected VoIP traffic is ‘telecommunications’ traffic, regardless of whether interconnected VoIP traffic were to be classified as a telecommunications service or information service.”¹⁸

The Commission’s *Core Mandamus Order* also compels the conclusion that Internet-enabled telecommunications exchanged between LECs is subject to reciprocal compensation. In that order, the Commission held that “although ISP-bound traffic falls within the scope of section 251(b)(5), this interstate, interexchange traffic is to be afforded different treatment from other section 251(b)(5) traffic pursuant to [the Commission’s] authority under section 201 and 251(i) of the Act.”¹⁹ The Commission further noted that Section 251(b)(5) imposes a duty on all LECs to “establish reciprocal compensation arrangements for the transport and termination of telecommunications,” with the term “telecommunications” not being “limited geographically (‘local,’ ‘intrastate,’ or ‘interstate’) or to particular services....”²⁰ The Commission, and not the states, therefore has the authority to establish “just and reasonable” reciprocal compensation

¹⁷ *Universal Service Contribution Methodology*, WC Docket Nos. 06-122, 04-36, CC Docket Nos. 96-45 *et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, ¶ 41 (2006) (“*Universal Service Contribution Methodology Order*”) (emphasis added, internal citations omitted).

¹⁸ In re *Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing an Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109, NPRM & FNPRM, FCC 11-13, ¶ 615 (rel. Feb. 9, 2011) (“NPRM”).

¹⁹ *Core Mandamus Order* at ¶ 6.

²⁰ *Core Mandamus Order* at ¶ 8.

rates for Internet-enabled traffic after correctly reaffirming its consistent finding “that ISP-bound traffic is jurisdictionally interstate” because it is jurisdictionally mixed and inseverable.²¹

The Commission thus responded to the D.C. Circuit’s *WorldCom* decision by repudiating its reliance on Section 251(g), as the court there noted that “there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic.”²² Relying instead on Sections 201 and 251(i) to place ISP-bound traffic within the confines of Section 251(b)(5), the Commission held “that the transport and termination of *all telecommunications* exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).”²³ The Commission thereby mandated that Internet-bound traffic is governed by reciprocal compensation, and not the mutually exclusive access charge regime.²⁴

As noted above, the Internet traffic Vaya receives from its VoIP-service-provider customers and exchanged with other LECs is simply ISP-bound traffic flowing in the other direction. Instead of being destined for the Internet, it is received therefrom and sent to the appropriate LEC for ultimate termination. It is therefore irrelevant whether this jurisdictionally mixed and inseverable traffic is called “local” or “toll” from a LEC’s standpoint. All telecommunications not excluded by Section 251(g) are subject to reciprocal compensation, and the Commission has ruled that “*all telecommunications* exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).”²⁵

²¹ *Id.* ¶ 21.

²² *WorldCom*, 288 F.3d at 433 (emphasis in original).

²³ *Core Mandamus Order* at ¶ 15 (emphasis added).

²⁴ See *PAETEC Communications, Inc. v. CommPartners, LLC*, 08-cv-00397, 2010 WL 1767193, *7 (D.D.C. Feb. 18, 2010) (“Reciprocal compensation and access charges are mutually exclusive methods of intercarrier compensation.”)

²⁵ *Core Mandamus Order* at ¶ 15 (emphasis added).

Accordingly, the Commission should declare that LEC-to-LEC VoIP traffic exchanges are subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2) and not a carrier's switched access tariff.

IV. CONCLUSION

For all these reasons, the Commission should declare that VoIP traffic originated on the public Internet is jurisdictionally interstate and not subject to a LEC's intrastate tariff when two LECs exchange such traffic. The Commission should further declare that such traffic is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2).

Dated: August 26, 2011

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I, Edilma Carr, hereby certify that on this 26th day of August 2011, a true and correct copy of the foregoing **PETITION OF VAYA TELECOM, INC. FOR DECLARATORY RULING REGARDING LEC-TO-LEC VOIP TRAFFIC EXCHANGES** was filed via hand delivery and/or electronic mail, as indicated below, to the following persons:

(by Hand Delivery)

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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